Nos. 89-1027 and 89-1028

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from provisions of a collective bargaining agreement that may jeopardize the implementation of the merger.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989, amending its prior opinion is unreported (Pet. App. 27a-28a). The opinion of the In-

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

terstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported, while the Commission's opinion in No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory Framework

Sections 11341 and 11344 of the Interstate Commerce Act (Act), 49 U.S.C. 11341, 11344, generally require that covered rail carriers secure the approval of the Interstate Commerce Commission (ICC) before conducting specified transactions, including mergers (see 49 U.S.C. 11343). Under Section 11344(c), the ICC must approve any such merger proposal "when it finds the transaction is consistent with the public interest."

Pursuant to Section 11347 of the Act, 49 U.S.C. 11347, the ICC imposes upon the parties a set of labor-protective conditions. Those conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90, aff'd, 609 F.2d 83 (2d Cir. 1979), establish, among other things, procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of labor disputes arising from ICC-approved railroad consolidations. Accordingly, Section 4 of

the *New York Dock* conditions, 360 I.C.C. at 84, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice. . ." (Pet. App. 3a). Section 2, 360 I.C.C. at 85, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements" (Pet. App. 3a-4a).

Finally, Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

B. Proceedings Below

1. *No. 89-1027*

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular

trains and facilities. In September 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transferring the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia. The carriers proposed that affected N & W employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. The committee concluded that (1) it had the authority to abrogate any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern; (2) the transfer of power distribution functions was part of the control transaction approved by the ICC; and (3) transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.

b. The Commission affirmed by a divided vote (Pet. App. 29a-46a). It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission" (*id.* at 33a). Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" (*id.* at 35a). Moreover, the ICC added, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)" (*ibid.*). Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function" (*id.* at 37a).[2]

2. *No. 89-1028*

a. In 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose prin-

[2] Commissioner Lamboley dissented (Pet. App. 42a-46a). In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

cipal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Railroad (later to become petitioner, CSX Transportation, Inc.). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a.

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. In 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated system * * *." Pet. App. 4a.

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.

The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. The panel stated, however, that as an "extension of the ICC," it had the authority to abrogate any Orange Book provision, and to relieve CSX from any requirement of the RLA, that impeded the transfer decision. The panel then held that (1) it would abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.

b. By a divided vote, the Commission affirmed in part and reversed in part (89-1028 Pet. App. 33a-52a). The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement" (*id.* at 43a). But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission" (*id.* at 44a). The Commission also found that, in light of the positions available at

Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction" (*id.* at 45a). The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland" (*id.* at 44a).[3]

3. *The Court of Appeals' Decision*

The court of appeals considered the two cases together and reversed and remanded (Pet. App. 1a-26a). The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of collective bargaining agreement provisions that impede implementation of the transaction. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "other law" in Section 11341(a) cannot be read to include "all legal obstacles" (Pet. App. 12a). The court also found no evidence in the legislative history to support the Commission's construction of the statute. In the court's view, "Congress focused nearly exclusively * * * on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 18a).

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to override provisions of the RLA, choosing instead to remand that issue to the Commission. The court observed that the Commission's present position with respect to the RLA "depart[s] from its earlier precedent" (Pet. App. 23a), and it therefore directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position" (*id.* at 25a). The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 23a). Because of that "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining" (*id.* at 25a).

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a [collective bargaining agreement]" (Pet. App. 25a). In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Pursuant to the court of appeals' remand order, the Commission thereafter determined that further hearings were necessary. By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue

[3] Commissioner Lamboley dissented (89-1028 Pet. App. 46a-52a). He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard (*id.* at 46a). He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions" (*id.* at 49a).

specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements" (*CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Dec. Finance Doc. No. 28,905 (Sub No. 22) (Aug. 31, 1989) [hereinafter ICC Dec. Finance Doc. No. 28,905]). The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties" (*ibid.*).

The Commission also filed a "limited" petition for rehearing in the court of appeals. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." ICC Dec. Finance Doc. No. 28,905.

On September 29, 1989, the court of appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand" (Pet. App. 54a). Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case (*id.* at 28a). Briefs by interested

parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

ARGUMENT

Petitioners challenge (89-1027 Pet. 10-24; 89-1028 Pet. 8-19) the court of appeals' decision holding that Section 11341(a) does not extend to provisions of a collective bargaining agreement. Although the Commission has differed with the court of appeals on that issue, we believe that, in light of the court's retention of jurisdiction and the ongoing proceedings before the Commission, the petitions for a writ of certiorari are premature and should not be granted.

The court of appeals remanded the record to the Commission to resolve a series of issues related to the scope of Section 11341(a). Pursuant to that order, the Commission is presently exploring a variety of alternative bases—left open by the court of appeals' decision—for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA. It is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision; at a minimum, the agency expects to create a fuller record on which to defend its decision if, and when, the case returns to the court of appeals.

In particular, the court of appeals expressly declined to address the Commission's arguments based on Section 11347 and on Section 4 of the *New York Dock* conditions, and also declined to decide whether Section 11341(a) contemplates that covered carriers may be exempted from the requirements of the RLA, including the provisions for resolution of disputes. Thus, the Commission's ultimate disposition of the case on remand may not be affected

by the court of appeals' present decision. Following that disposition, the court of appeals would have an opportunity to review the matter anew, in light of the reconsidered, and more fully elaborated, views of the Commission.

We believe that the proceedings on remand should be permitted to take their course. Should the court of appeals thereafter revisit the matter, it would do so on the basis of a more complete record and a better developed statement of the agency's position. If, at that point, review by this Court is warranted, the case should then present a more appropriate vehicle for resolution of the disputed issues.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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